UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HYDE LEADERSHIP CHARTER SCHOOL – BROOKLYN, Employer-Petitioner, and UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO, Union.	)	29-RM-126444

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

STATUTES: Page

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The American Federation of Labor and Congress of Industrial Organizations files this brief *amicus curiae* in support of the United Federation of Teachers' position that Hyde Leadership Charter School – Brooklyn ("Hyde") is a political subdivision exempt from the National Labor Relations Board's jurisdiction. Based on a straightforward application of the Board test endorsed by the Supreme Court in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) ("*Hawkins County*"), Hyde is a political subdivision. That conclusion is confirmed by the great lengths to which the New York legislature went in enacting the New York Charter Schools Act to ensure that charter school teachers – like other public school teachers in the state – could not interfere with the orderly provision of public education by engaging in strikes and other work stoppages.

ARGUMENT

1. Section 2(2) of the National Labor Relations Act defines the term "employer" for purposes of the National Labor Relation Board's jurisdiction. 29 U.S.C. § 152(2). That definition states that "[t]he term 'employer' . . . shall not include . . . any State or political subdivision thereof." *Ibid.* "The term 'political subdivision' is not defined in the Act and the Act's legislative history does not disclose that Congress explicitly considered its meaning." *Hawkins*

County, 402 U.S. at 604. "The legislative history does reveal, however, that Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike." *Ibid.*

In *Natural Gas Utility District of Hawkins County*, 167 NLRB 691, 691-92 (1967), the Board explained that in "the usual situation where jurisdiction [is] declined on political subdivision grounds, the Employer . . . is []either created directly by the State, []or administered by State-appointed or elected officials." Applying this test, the Board concluded that the Hawkins County utility district "exist[ed] as an essentially private venture, with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act." *Id.* at 691.

Reviewing the Board's decision, the Supreme Court approved of "[t]he Board's construction of the broad statutory term ['political subdivision']" as "limited . . . to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Hawkins County*, 402 U.S. at 604-05 (quotation marks omitted). But the Court concluded that "the Board erred in its reading of [the Tennessee Utility District Law] in light of the Board's own test," *id.* at 605,

explaining that the utility district "is . . . an entity 'administered by individuals [the commissioners] who are responsible to public officials [an elected county judge]' and this together with the other factors mentioned satisfies us that its relationship to the State is such that [the utility district] is a 'political subdivision' within the meaning of § 2(2) of the Act," *id.* at 609.

As Judge Posner later observed, the Supreme Court's reversal of the Board's decision in *Hawkins County* illustrates that,

> "[I]t is not always clear whether one is dealing with a private agency or a political subdivision even in the rather nominalistic sense that we think appropriate in order to make the statute at least minimally definite because agencies don't always come with the appropriate labels clearly affixed. The gas distributor held to be a political subdivision in [*Hawkins County*] could have been classified either way, but apparently what was decisive was that the power to appoint its governing board had been lodged in a public official." *NLRB v. Kemmerer Village, Inc.*, 907 F.2d 661, 662-63 (7th Cir. 1990) (Posner, J.).

The Board's subsequent cases applying *Hawkins County* accordingly reflect a fact-intensive inquiry, eschewing categorical rules that depend on the "labels . . . affixed" to an organization. *Id.* at 663.

For example, following *Hawkins County*, the Board has generally found utility districts to fall outside the Board's jurisdiction under Section 2(2) of

the Act. *See*, *e.g.*, *Salt River Project Agricultural Improvement and Power District*, 231 NLRB 11 (1977); *Electrical District No. 2, Pinal County, Arizona*, 224 NLRB 904 (1976). However, in *Concordia Electric Cooperative, Inc.*, 315 NLRB 752, 753 (1974), the Board found a particular utility *not* to constitute a political subdivision because, as relevant to the second prong of *Hawkins County*, its board of directors was not selected by public officials or the general electorate, but rather by "entities such as corporations [and] associations."

Similarly, the Board has generally found nonprofit cultural and scientific organizations to constitute "employers" under Section 2(2) of the Act. *See*, *e.g.*, *Minneapolis Society of Fine Arts*, 194 NLRB 371 (1971); *Culinary Alliance and Hotel Service Employees Union Local 402 (The San Diego Civic Facilities Corp.)*, 175 NLRB 161 (1969). *Cf. Woods Hole Oceanographic Institution*, 143 NLRB 568 (1963) (pre-*Hawkins County* decision). In *Oklahoma Zoological Trust*, 325 NLRB 171, 171 (1997), however, the Board found that a zoo was a political subdivision because its trustees are "selected by the mayor from a slate provided by the [Zoological] Society and are confirmed by the city council," and are "subject to removal from office by the district court" pursuant to statute, thus "satisf[ying] the second prong of *Hawkins*." *See also Founders Society Detroit Institute of Arts*,

271 NLRB 285 (1984) (museum is political subdivision under *Hawkins County* because its executive director is appointed by municipal officials).

The Board also has generally found that nonprofit schools for disabled children that provide educational services required by state law are not political subdivisions, *see*, *e.g.*, *D.T. Watson Home for Crippled Children*, 242 NLRB 1368 (1979), although for a time the Board exercised its discretion under Section 14(c)(1) of the Act to decline jurisdiction over such schools, *see Overbrook School for the Blind*, 213 NLRB 511 (1974), and *Pennsylvania School for the Deaf*, 213 NLRB 513 (1974). However, as is especially pertinent to this case, in *New York Institute for the Education of the Blind*, 254 NLRB 664, 665-66 (1981), the Board found a similar school for disabled children – one of ten such schools in New York operating under a special provision of state education law – to be a political subdivision. The Board based this decision on the fact that the school "was . . . incorporated by act of the New York state legislature," and "operate[d] under the supervision of the New York state board of regents." *Id.* at 665. As the Board explained, "[t]he state legislature . . . has consciously and specifically denominated the Institute . . . as its agent in satisfying the State's perceived obligation or constitutionally mandated requirement of providing the State's residents with a suitable education." *Id.* at 667.

In sum, where "it is not . . . clear whether one is dealing with a private agency or a political subdivision," *Kemmerer Village*, 907 F.2d at 663, that determination appropriately turns not on the "label[] . . . affixed," *ibid.* – whether that label is "utility district," "cultural institution," "school for the disabled," or "charter school" – but on a careful application of the *Hawkins County* test to the facts of each case.

2. The Board's decision in *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (Dec. 14, 2012), reflects this fact-based – rather than categorical – approach to the political subdivision inquiry. Because the Board's holding in that case was based on an application of the *Hawkins County* test to the particular facts at issue – and not any general conclusion about the nature of charter schools – the Board's conclusion that the Chicago Mathematics & Science Academy ("CMSA") fell within the Board's jurisdiction does not foreclose the Board from finding here that Hyde is a political subdivision.[1]

The Board in *Chicago Mathematics* explicitly based its decision "on the facts of th[at] case, which involves the operation of a public charter school

[1] We also recognize that the Board's decision in *Chicago Mathematics* carries no precedential weight after *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), which invalidated the appointments of Members Griffin and Block, who provided a quorum in *Chicago Mathematics*. The Board need not decide here whether *Chicago Mathematics* was correctly decided because, even if the current Board were to agree with the rationale and conclusions reached in that case, this case is distinguishable for the reasons we explain in the text.

under the particular provisions of Illinois law" and "d[id] *not* establish a bright-line rule that the Board has jurisdiction over entities that operate charter schools, wherever they are located and regardless of the legal framework that governs their specific relationships with state and local governments." *Id.*, Slip Op. 1 (emphasis added).

For purposes of the *Hawkins County* inquiry, the relevant facts in *Chicago Mathematics* were that CMSA "was created by private individuals, and not by a government entity, special legislative act, or public official," 359 NLRB No. 41, Slip Op. 6, and that "none of CMSA's governing board members [we]re appointed by or subject to removal by any public official," *id.*, Slip Op. 8.

As to the first prong of the *Hawkins County* test, the *Chicago Mathematics* Board found especially probative that "CMSA was created and incorporated by private individuals as a not-for-profit corporation under the Illinois General Not-for-Profit Act, and only after it was established and incorporated did CMSA establish the Academy following the process set out in the Illinois Charter Schools Law." *Id.*, Slip Op. 7. The sequence by which the school was created illustrated that "[t]here is no Illinois statute that directs that charter schools be created or that directly creates charter schools." *Ibid.* Rather, "absent the independent initiative of private individuals and the separate authority of the Not-for-Profit Corporation Act,

the Charter Schools Law would do nothing to bring charter schools into existence." *Ibid.* CMSA, therefore, was not "created *directly* by the state" within the meaning of *Hawkins County*. 402 U.S. at 604-05 (emphasis added).

As to the second prong of *Hawkins County*, the *Chicago Mathematics* Board stated that "the fact that CMSA's governing board is subject solely to private appointment and removal" "is properly regarded as the critical and determinative factor in a second-prong analysis." 359 NLRB No. 41, Slip Op. 9. The fact that "none of [CMSA's board members] are responsible to public officials in their capacity as board members" means that "CMSA is not 'administered' by individuals who are responsible to public officials or the general electorate." *Ibid.* (quoting *Hawkins County*, 402 U.S. at 604-05). The Board therefore concluded that CMSA "is not a political subdivision of the State of Illinois under either analytical prong of the *Hawkins County* test." *Id.*, Slip Op. 1.

3. In contrast to CMSA – and much like the school for disabled children at issue in *New York Institute for the Education of the Blind* – Hyde was created directly by the state so as to constitute an administrative arm of the government. In addition, Hyde – much like the utility district at issue in *Hawkins County* – is administered by individuals who are responsible to public officials. Hyde is therefore a political subdivision within the meaning

of Section 2(2) of the Act under either prong of the *Hawkins County* test.[2] As we explain below, this analysis turns significantly on the fact that the New York Charter Schools Act – unlike the Illinois Charter Schools Law – requires public agencies and officials to exercise a great deal of control over both the creation and day-to-day operation of New York's charter schools.

a. Hyde, like all charter schools in New York, is directly created by at least one, and typically two, state agencies. This is in sharp contrast to the charter school at issue in *Chicago Mathematics*, which, the Board found, "was created and incorporated by *private individuals* as a not-for-profit corporation under the Illinois General Not-for-Profit Act, and only *after* it was established and incorporated did CMSA establish the Academy following the process set out in the Illinois Charter Schools Law." 359 NLRB No. 41, Slip Op. 7 (emphasis added). In contrast, under the New York Charter Schools Act, two

[2] Because "[f]ederal, rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political subdivision' of the State and therefore not an 'employer' subject to the Act," *Hawkins County*, 402 U.S. at 602-03, the Regional Director erred in relying on New York state court decisions to conclude that Hyde is not a political subdivision. *See* DDE 16-18 (discussing *New York Charter Schools Association v. Smith*, 15 N.Y.3d 403 (N.Y. 2010), and *New York Charter Schools Association v. DiNapoli*, 13 N.Y.3d 120 (N.Y. 2009)).

In any event, neither state court decision considered by the Regional Director sheds light on the matter at issue here. In *Smith*, 15 N.Y.3d at 409, the New York Court of Appeals concluded that charter schools are not public agencies covered by the New York prevailing wage law based on the fact that, "[b]y its terms, the [prevailing wage] statute does not expressly apply to education corporations, and that includes charter schools." And, in *DiNapoli*, 13 N.Y.3d at 131 – which concerned the state comptroller's audit authority over charter schools – the question of whether charter schools are political subdivisions was not presented to the Court of Appeals and the case was decided on other grounds.

government agencies typically approve the creation of the education corporation that operates the charter school, with the second agency – not private individuals – then creating the education corporation by incorporating it as a legal body.

Specifically, a "charter entity" – defined by the New York Charter Schools Act as the board of education of a school district (or, in New York City, the chancellor of the New York City Department of Education), the board of trustees of the State University of New York, or the New York Board of Regents, N.Y. Ed. Law § 2851.3 – must initially approve an application to create a charter school. *Id.*, § 2852. Once that initial approval is granted, the charter entity and the applicant enter into a detailed agreement – known as the charter – regarding the future organization and operation of the school. *Id.*, § 2852.5 (stating that the agreement must include all information described in N.Y. Ed. Law § 2851.2(a)-(x)). The charter entity then submits this proposed charter to the New York Board of Regents[3] for final approval. *Id.*, §§ 2852.5 & 2852.5-a.

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[3] "The Regents are responsible for the general supervision of all educational activities within the State, presiding over The University and the New York State Education Department." *See* "About the Board of Regents," available at http://www.regents.nysed.gov/about/ (last checked Nov. 14, 2014). The Regents "exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, power, duties and trusts conferred or charged upon the university [of the State of New York] and the education department." N.Y. Ed. Law § 207. Each regent is elected for a seven-year term by the state legislature. *Id.*, § 202.

The Board of Regents either approves the proposed charter, returns the proposed charter to the charter entity for reconsideration with written comments and recommendations, or denies the charter. *Id.*, §§ 2852.5-a, 2852.5-b & 2852.6. If the Regents approve the proposed charter, the Regents, *not* the private applicants, "incorporate the charter school as an education corporation for a term not to exceed five years." *Id.*, § 2853.1(a)(1).[4] Only the Board of Regents can extend a certificate of incorporation for an additional five-year term. *Ibid.* And, only the Board of Regents or the charter entity can terminate a charter. *Id.*, § 2855.1.

Here, although Dr. Sandra DuPree, a private individual, submitted the initial application to establish Hyde, it was the Chancellor of the New York City Department of Education, acting as the charter entity under the New York Charter Schools Act, who initially approved that application and entered into a proposed charter agreement with Dr. DuPree. DDE 11. The Chancellor then submitted the proposed charter agreement to the New York

[4] An "education corporation" is a special type of not-for-profit organization defined by New York law as "a corporation (a) chartered or incorporated by the regents or otherwise formed under this chapter, or (b) formed by a special act of this state with its principal purpose an education purpose and which is a member of the university of the state of New York, or (c) formed under laws other than the statutes of this state which, if it were to be formed currently under the laws of this state, might be chartered by the regents, and which has been authorized to conduct its activities in this state by the regents or as an authorized foreign education corporation with the consent of the commissioner. A corporation as defined in the business corporation law is not an education corporation under this section." N.Y. Ed. Law. § 216-a.1.

Board of Regents, which separately approved the agreement and then incorporated Hyde as an education corporation under state law. DDE 12.

The statutory framework within which Hyde was established is thus very similar to the circumstances presented by *New York Institute for the Education of the Blind*. Like the Institute, Hyde was established pursuant to "an act of the legislature"[5] – *viz.*, the New York Charter Schools Act – and "operates under the supervision of the New York state board of regents." *New York Institute for the Education of the Blind*, 254 NLRB at 665. And, as was the case with the Institute, it is clear from the New York Charter Schools Act that "[t]he state legislature . . . has consciously and specifically denominated [charter schools] . . . as its agent in satisfying the State's perceived obligation or constitutionally mandated requirement of providing the State's residents with a suitable education." *Id.* at 667.

b. In addition to the role Hyde plays "in satisfying the State's . . . requirement of providing residents with a suitable education," *ibid.*, there is significant additional evidence that Hyde "constitute[s] . . . an administrative arm of the government." *Hawkins County*, 402 U.S. at 694.

[5] While it is true that the Institute was created directly by the legislature, while Hyde was created by the Board of Regents pursuant to authority delegated by the legislature in the New York Charter Schools Act, "[i]t is well established that the National Labor Relations Board recognizes entities created by . . . governments pursuant to an enabling state statute, as having been directly created by the state under *Hawkins*." *Hinds County Human Resource Agency*, 331 NLRB 1404, 1404 (2000).

First, it is important to understand that, unlike CMSA and unlike government contractors, Hyde, by law, exclusively performs the public function of providing public education. A charter school created pursuant to the Illinois Charter Schools Law could, because it is "incorporated . . . as a not-for-profit corporation under the Illinois General Not-for-Profit Act," undertake non-public functions, like any government contractor, in addition to operating a charter school. *Chicago Mathematics*, 359 NLRB No. 41, Slip Op. 7. In contrast, Hyde, as an education corporation created pursuant to the New York Charter Schools Act, is strictly limited to operating a charter school pursuant to the "terms of the charter approved by the board of regents." N.Y. Ed. Law § 2853.1. That charter states that Hyde is empowered "to establish and operate the Hyde Leadership Charter School." Joint Ex. 2. And, Hyde's bylaws confirm that "[t]he purpose of the [Hyde Leadership Charter School – Brooklyn] is to operate a public school as set forth in the Charter." Joint Ex. 1.[6]

It is thus not surprising, and is critically important, that the New York Charter Schools Act vests the Board of Regents and the charter entity with a high "degree of governmental operating and budgeting control" over charter schools, which the NLRB considers strong evidence that an entity is "an

[6] There is thus no conflict between the conclusion that Hyde is a political subdivision and the Board's broad assertion of jurisdiction over government contractors. *See Management Training Corp.*, 317 NLRB 1355 (1995).

'administrative arm' of the State." *Jervis Public Library Association, Inc.*, 262 NLRB 1386, 1388 (1982) (internal citation omitted). *See also State Bar of New Mexico*, 346 NLRB 674, 677-79 (2006); *New York Institute for the Education of the Blind*, 254 NLRB at 666-67. New York charter schools are required by law to regularly report to the Board of Regents and the charter entity on the school's "comparative academic and fiscal performance," including "graduation rates, dropout rates, performance of students on standardized tests, college entry rates, total spending per pupil and administrative spending per pupil," as well as provide certified financial statements that include independent fiscal audits of the school. N.Y. Ed. Law § 2857.2. Where this reporting reveals inadequate academic performance or fiscal mismanagement, the Board of Regents or charter entity may place the charter school "on probationary status to allow the implementation of a remedial action plan." *Id.*, § 2855.3. If that plan is unsuccessful – or if the charter school engages in misconduct – the Board of Regents or charter entity may revoke the school's charter." *Id.*, § 2855.1.[7] The Board of Regents and

[7] In addition to these statutory controls, Hyde's charter agreement with the Chancellor of the New York City Department of Education subjects Hyde to an intensive "Charter School Monitoring Plan," which includes detailed recordkeeping requirements as well as provisions for planned and unannounced site visits "to ascertain the ongoing fiscal and educational soundness of the Charter School." Joint Ex. 2 (attached as "Exhibit C" to the charter agreement).

Chancellor therefore "exercise[] substantial control over [Hyde]'s priorities and operations." *State Bar of New Mexico*, 346 NLRB at 679.

Beyond the operating and budgeting control exercised by the Board of Regents and the Chancellor over Hyde, there are several additional strong indicators that Hyde constitutes an administrative arm of the state for the purpose of meeting New York's obligation to provide public education to its citizens. First, under the New York Charter Schools Act, Hyde is "exempt to the same extent as other public schools from all taxation, fees, assessments or special ad valorem levies on its earnings and its property," N.Y. Ed. Law § 2853.1(d), a fact the Board holds "support[s] a finding that the Employer was created as an administrative arm of the state." *Hinds County Human Resource Agency*, 331 NLRB at 1405. *See also University of Vermont*, 297 NLRB 291, 295 (1989). Next, the New York Charter Schools Act permits Hyde employees to participate in "the teachers' retirement system and other retirement systems open to employees of public schools" "in the same manner as other public school employees," N.Y. Ed. Law § 2854.3(c), another fact the Board has found highly relevant to whether an entity is an administrative arm of government. *See Hinds County Human Resource Agency*, 331 NLRB at 1405; *Jervis Public Library Association*, 262 NLRB at 1388. Finally, as we describe in detail in the final section of this brief, the New York legislature went to great lengths to "include [charter school] employees within the

coverage of the . . . [s]tate [e]mployee [l]abor [r]elations [l]aw," *University of Vermont*, 297 NLRB at 295 – in large part to ensure that charter school teachers could not disrupt the orderly provision of public education by striking, *see infra* pages 21-23 – a fact that further indicates that New York intended its charter schools to function as an administrative arm of the state.

In sum, unlike the charter school at issue in *Chicago Mathematics* – and like the school in *New York Institute for the Education of the Blind* – Hyde meets the first prong of the *Hawkins County* test of being "created directly by the state, so as to constitute . . . [an] administrative arm[] of the government." 402 U.S. at 604-05. That alone is a sufficient basis for the Board to conclude that Hyde is a political subdivision under Section 2(2) of the Act.

c. Hyde also meets the second prong of the *Hawkins County* test because it is "administered by individuals who are responsible to public officials." 402 U.S. at 604-05. This provides an additional and independent basis for the Board to find that Hyde is a political subdivision under Section 2(2) of the Act. Again, the key fact is that the New York Charter Schools Act, in contrast to Illinois Charter Schools Law, requires the state to exercise a great deal of control over the creation and day-to-day operation of charter schools, in this case through the appointment and removal of a charter school's trustees.

In *Chicago Mathematics*, the Board placed great weight on the fact "that CMSA's governing board is subject solely to *private* appointment and removal," stating that that fact "is properly regarded as the critical and determinative factor in a second-prong analysis." 359 NLRB No. 41, Slip Op. 9 (emphasis added). In explaining this point, the Board cited *Oklahoma Zoological Trust*, 325 NLRB 171 (1997), as a contrasting example of an organization found to be a public subdivision because it was "administered by individuals who are responsible to *public officials*." *Chicago Mathematics*, 359 NLRB No. 41, Slip Op. 9 & n. 24 (emphasis added) (quotation marks omitted). The essential point for purposes of the second prong of the *Hawkins County* analysis in that case was that the majority of the board was "selected by the mayor from a slate provided by the [Zoological] Society and . . . confirmed by the city council." *Oklahoma Zoological Trust*, 325 NLRB at 171. The zoo was, therefore, "administered by individuals who are responsible to public officials," *Hawkins County*, 402 U.S. at 604-05, even if the zoo's trustees – like the commissioners of the utility district in *Hawkins County* – were selected "from among persons nominated," *id.* at 607, by private individuals.

The New York Charter Schools Act requires the New York Board of Regents – a *public* body – to review the "qualifications" and "background information" of trustees proposed by the charter school applicant and then

appoint the initial board of trustees from among these proposed trustees as part of the process of incorporating the charter school as an education corporation. N.Y. Ed. Law §§ 2851.2(c) & (m), 2853.1. The Act also requires the Regents to fill "[a]ny vacancy in the office of trustee continuing for more than one year, or any vacancy reducing the number of trustees to less than two-thirds of the full number." *Id.*, § 226.4 (incorporated by reference into the New York Charter Schools Act by N.Y. Ed. Law § 2853(b)). In addition to these statutory requirements, Hyde's charter agreement with the Chancellor of the New York City Department of Education requires Hyde to submit the name and background information of any individual proposed to *replace* an initial board member to the Department of Education for approval.[8]

There is therefore *more* government involvement in the appointment of Hyde's trustees than was the case in *Hawkins County*, where the utility district's "commissioners [we]re initially appointed, from among persons nominated in [a] petition, by the county judge," but subsequent replacement commissioners were only appointed by the judge if, "[w]hen a vacancy occurs,

[8] The charter agreement states: "Prior to the appointment or election of any individual to the Board who is not a Founding School Trustee, the Board must submit to OPD [the Office of Portfolio Development of the New York City Department of Education] (pursuant to and together with a duly approved resolution of the Board) the name of the proposed member of the Board and such individual must timely provided to OPD, in writing and/or in person, such background information as OPD shall require. Within forty-five days of receiving the name of the proposed member of the Board, OPD shall in writing reject or approve such individual." Joint Ex. 2, ¶ 2.12(a).

. . . the remaining two commissioners cannot agree upon a replacement." 402 U.S. at 607-08. In contrast, in Hyde's case, not only are initial trustees appointed by the New York Board of Regents, but *any* replacement trustees must be approved by the New York City Department of Education as well.

The New York Charter Schools Act also provides the New York Board of Regents authority to "*remove* any trustee . . . for misconduct, incapacity, neglect of duty, or where it appears to the satisfaction of the regents that the corporation has failed or refuses to carry into effect its educational purposes," as well as to "appoint successors to the trustees so removed." N.Y. Ed. Law § 226.4 (emphasis added). In addition, Hyde's charter agreement with the Chancellor of the New York City Department of Education requires Hyde's trustees to file annual financial disclosure reports and states that if a trustee fails to do so – or if a trustee's report "is in material respects incomplete, misleading, or untruthful" – Hyde is required to timely remove the trustee "notwithstanding any provision of [Hyde's] By-laws." Joint Ex. 2, ¶ 2.12(d). Failure to do so constitutes a "material violation" of the charter agreement, *ibid.*, and would subject Hyde to possible termination of its charter by the Chancellor or the Board of Regents. *See* N.Y. Ed. Law § 2855.1(c) (listing "[m]aterial and substantial violation of the charter, including financial mismanagement" as grounds for termination).

Again, these detailed removal provisions mandate *more* government involvement in the removal of Hyde's trustees than was the case for the utility district at issue in *Hawkins County*, where the commissioners were only "subject to removal under Tennessee's General Ouster Law, which provides procedures for removing public officials from office for misfeasance or nonfeasance." 402 U.S. at 607. Here, in contrast, Hyde's trustees are additionally subject to removal for failure to provide a complete and accurate financial disclosure report.

In sum, government officials have greater control over the appointment and removal of Hyde's trustees than was the case with regard to the commissioners of the utility district at issue in *Hawkins County*.[9] Based on the appointment and removal procedures of the New York Charter Schools Act, as well as those set forth in Hyde's agreement with the Chancellor of the New York City Department of Education, there can be no doubt that, as to this "critical and determinative factor in a second-prong analysis," *Chicago Mathematics*, 359 NLRB No. 41, Slip Op. 9, Hyde's governing board is subject to *public* appointment and removal such that it is "administered by

[9] These facts also easily distinguish this case from *Research Foundation of the City University of New York*, 337 NLRB 965 (2002), a case on which the Regional Director relied in finding Hyde not to be a political subdivision. *See* DDE 25. In strong contrast to the facts at issue here, in *Research Foundation*, 337 NLRB at 966, "[t]he appointment and removal of the Employer's board members [wa]s governed solely by the board's by-laws and without reference to any statute or other law."

individuals who are responsible to public officials" for purposes of the second prong of the *Hawkins County* test. This conclusion provides a further, independent, basis for the Board to find that Hyde is a political subdivision within the meaning of Section 2(2) of the Act.

4. Finally, it is highly significant that, in enacting the New York Charter Schools Act, the New York state legislature sought to integrate charter schools into its existing system of public school labor relations, including the prohibition on strikes by teachers and other public school employees. As the Supreme Court has observed, "Congress enacted the § 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees did not usually enjoy the right to strike." *Hawkins County*, 402 U.S. at 604.

All New York charter schools are covered by New York's Public Employees' Fair Employment Act, N.Y. Civ. S. Law, Art. XIV, commonly referred to as the "Taylor Law." N.Y. Ed. Law § 2854.3. In enacting the Taylor Law, the legislature stated that "it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." N.Y. Civ. S. Law § 200. To achieve that latter goal, the Taylor Law bars public employees from striking and institutes harsh penalties

against unions and individual employees for violating this prohibition, including the loss of the union's right to payroll dues deduction and fines levied against individual employees equal to two day's pay for each day an employee engages in a work stoppage. N.Y. Civ. S. Law § 210.

It would be anomalous for the State of New York, in the New York Charter Schools Act, to vest in charter schools "powers . . . [which] constitute the performance of essential public purposes and governmental purposes of this state," N.Y. Ed. Law § 2853.1(d) – *i.e.*, the responsibility to "satisfy[] the State's perceived obligation or constitutionally mandated requirement of providing the State's residents with a suitable education," *New York Institute for the Education of the Blind*, 254 NLRB at 667 – while exempting charter school teachers and other employees from the Taylor Law's prohibition on strikes and penalties for the violation of that prohibition. Such a result would fail to meet the stated purpose of the Taylor Law of "protect[ing] the public by assuring, at all times, the orderly and uninterrupted operations and functions of government," N.Y. Civ. S. Law § 200, since charter school teachers, if covered by the NLRA, *could* strike and, by doing so, interrupt the "essential public purposes . . . of th[e] state," N.Y. Ed. Law § 2853.1(d). Moreover, any attempt by a charter school to penalize a union or individual employee for striking – in the manner clearly *mandated* by the Taylor Law with regard to public employees – would just as clearly be *barred* by Section

8(a) of the NLRA. By ensuring that charter schools are covered by the Taylor Law, the New York legislature expressly rejected that anomalous result and that fact is highly relevant here.

The New York legislature's strong concern with integrating charter schools into the state's existing system of public school labor relations is further illustrated by the fact that a charter school can lose its charter for violating the Taylor Law. The New York Charter Schools Act lists "interference with or discrimination against employee rights" as one of five enumerated grounds on which a charter school can have its charter revoked or terminated. N.Y. Ed. Law § 2855.1(d) (cross-referencing the Taylor Law's prohibitions on "improper employer practices," N.Y. Civ. S. Law § 209-a.1, which parallel employer unfair labor practices described in NLRA § 8(a)). This provision ensures that the legislature's stated purpose in the Taylor Law of "promot[ing] harmonious and cooperative relationships between government and its employees," N.Y. Civ. S. Law § 200, is accomplished by requiring charter schools to respect employee rights or risk losing their ability to operate. Obviously, if New York charter schools were covered by the NLRA, the state's efforts to levy such a penalty for a charter school's unfair labor practices would be preempted. *See Wis. Dep't of Indus., Labor & Human Rels. v. Gould Inc.*, 475 U.S. 282 (1986). Such a result would render New York powerless to accomplish its stated policy of promoting positive

labor-management relationships in the provision of public education through charter schools.

Finally, it is worth noting that, in integrating charter schools into the existing public school labor relations system, the New York legislature has gone well beyond simply mandating charter school coverage by the Taylor Law and has taken the further step of *directly* integrating many charter schools into existing bargaining units and even requiring that some charter schools be covered by existing collective bargaining agreements. The New York Charter Schools Act mandates that where an existing public school is converted into a charter school, *see* N.Y. Ed. Law § 2851.3(c), the school's employees "shall be deemed to be included within the negotiating unit containing like titles or positions, if any, for the school district in which such charter school is located and shall be subject to the collective bargaining agreement covering that school district negotiating unit." *Id.*, § 2854.3(b). In the case of a newly-organized charter school whose enrollment exceeds 250 students, employees "shall be deemed to be represented in a separate negotiating unit at the charter school by the same employee organization, if any, that represents like employees in the school district in which such charter school is located." N.Y. Ed. Law § 2854.3(b-1)(i). And, in the case of a smaller newly-organized charter school, while employees are not automatically deemed to be represented by a union, the New York Charter

Schools Act guarantees reasonable access to the school for any employee organization that seeks to represent school employees and prohibits the charter school from interfering with employee efforts to organize, *id.*, § 2854.3(c-1) & (c-2), thus strongly promoting charter school collective bargaining within the unique limits set by the Taylor Law.

In sum, the great lengths to which the New York legislature has gone to integrate charter schools into its existing public school labor relations system illustrates the state's purpose to "except from Board cognizance the labor relations of [charter schools]," especially "since [other New York public school] employees d[o] not . . . enjoy the right to strike." *Hawkins County*, 402 U.S. at 604. Taken together with the fact, as we have shown, that Hyde was "created directly by the state, so as to constitute . . . [an] administrative arm[] of the government" *and* is "administered by individuals who are responsible to public officials," *id.* at 604-05 – and therefore meets both prongs of the *Hawkins County* test – it is clear that Hyde is a political subdivision under Section 2(2) of the NLRA.

CONCLUSION

The Board should reverse the Regional Director's Decision and Direction of Election and dismiss the petition.

Respectfully submitted,

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